2004

State of Utah v. Rodriguez : Brief of Appellant

Utah Court of Appeals

Lori J. Seppi; Salt Lake Legal Defender Assoc.; Counsel for Respondent.
Matthew D. Bates; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Micheal Postma; Deputy Salt Lake County District Attorney; COunsel for Petitioner.

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Petitioner, vs. HEATHER JO RODRIGUEZ, Defendant/Respondent.	Case No. 20040566-SC

SUPPLEMENTAL BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

MATTHEW D. BATES (9861)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

MICHAEL POSTMA
Deputy Salt Lake County District Attorney

Counsel for Petitioner

LORI J. SEPPI
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 310
Salt Lake City, UT 84111

Counsel for Respondent

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MARK L. SHURTLEFF (4666)
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160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

MICHAEL POSTMA
Deputy Salt Lake County District Attorney

Counsel for Petitioner

LORI J. SEPPI
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 310
Salt Lake City, UT 84111

Counsel for Respondent

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SUPPLEMENTAL BRIEF OF PETITIONER

* * *

STATEMENT OF SUPPLEMENTAL ISSUE

Did the totality of the circumstances justify drawing defendant's blood without a warrant, where her body had been destroying evidence of automobile homicide since the accident and would continue to destroy it while police sought a warrant?

SUPPLEMENTAL STATEMENT OF THE CASE

In its opening brief, the State argued that *Schmerber v. California*, 384 U.S. 757 (1966), and its progeny established what is, for all practical purposes, a per se rule that the destruction of blood-alcohol evidence in an impaired driver is an exigency that justifies drawing the driver's blood without a warrant. Br. Pet. at 7–14. The State also argued, however, that even absent *Schmerber* and its progeny, the warrantless blood draw was justified under the traditional totality of the circumstances test. Br. Pet. at 14–26. Defendant objected to the State's totality of the

circumstances analysis on the ground that it was not fairly included within the question presented in the writ of certiorari. Br. Resp. at 29.

This Court subsequently amended its writ of certiorari to include review of the court of appeals' totality of the circumstances test. *See* Order dated September 6, 2006. The State now supplements the arguments in point B of its Brief of Petitioner with the following.

SUPPLEMENTAL ARGUMENT

UNDER AN OBJECTIVE VIEW OF THE TOTALITY OF THE CIRCUMSTANCES, POLICE WERE JUSTIFIED IN DRAWING DEFENDANT'S BLOOD WITHOUT A WARRANT

The Fourth Amendment guards against "unreasonable" intrusions by the government into our "persons, houses, papers, and effects." U.S. Const. amend. IV; *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (noting that Fourth Amendment's central requirement is "one of reasonableness"). An intrusion is presumed reasonable when accompanied by a warrant. *See McArthur*, 531 U.S. at 330. Warrantless intrusions are also reasonable, however, when justified by "special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like." *Id.*

Whether a warrantless intrusion is reasonable depends on "all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985). Thus,

while exceptions to the warrant requirement are often labeled in neat categories such as "exigent circumstances" or "the automobile exception," the true test for reasonableness weighs the competing interests of the government and the individual based on the facts known to the government agent performing the search. *Id.* ("The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (citations and quotations omitted)). When the government's interest in obtaining the evidence without a warrant outweighs the individual's interest in the privacy of his home, person, or effects, a warrantless intrusion is reasonable.

In balancing the State's and the suspect's interests in cases involving a bodily intrusion, the Supreme Court has considered two factors: (1) whether there is an objectively reasonable belief that that the evidence will be lost before officers can obtain a warrant, *see Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 624 (1989); *Schmerber v. California*, 384 U.S. 757, 770–71 (1966); and (2) whether the State's interest in obtaining evidence outweighs the suspect's interest in the privacy and

security of his body, *see Winston v. Lee*, 470 U.S. 753, 763 (1985); *Welsh v. Wisconsin*, 466 U.S. 740, 753–54 (1984).[1]

A. Officers reasonably believed that delay to get a warrant threatened the destruction of evidence.

Courts have repeatedly held that the imminent destruction of evidence is an exigency that may justify intruding into a protected area without first obtaining a warrant. *See United States v. Banks*, 540 U.S. 31, 36 (2003); *McArthur*, 531 U.S. at 332; *Schmerber*, 384 U.S. at 770–71; *Ker v. California*, 374 U.S. 23, 41–42 (1963); *State v. Ashe*, 745 P.2d 1255, 1258 (Utah 1987). To prove an exigency, the State need only demonstrate a reasonable belief that "the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Schmerber*, 384 U.S. at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)); *see also McArthur*, 531 U.S. at 332 (upholding warrantless detention because police "reasonably could have concluded" that McArthur would destroy drugs during time needed to get a warrant); *Banks*, 540 U.S. at 36 (holding that police only need reasonable suspicion of destruction of evidence to forcibly enter home without announcing presence when serving a warrant). The required level of suspicion is the same as that needed under

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[1] Of course, officers must also have probable cause. *See Schmerber*, 384 U.S. at 769. That question was raised by defendant in the court of appeals, but not decided by that court. *See State v. Rodriguez*, 2004 UT App 198, ¶ 7, 93 P.3d 854.

Terry v. Ohio to temporarily detain and frisk a person suspected of criminal activity—reasonable belief. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that officer may stop and frisk suspect when officer "has reason to believe that he is dealing with an armed and dangerous individual").

The reasonableness of the belief is determined by considering the totality of the circumstances objectively from the officer's standpoint. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances."). Only the objective circumstances are considered. *See Brigham City v. Stuart*, 126 S.Ct. 1943, 1948 (2006). "The officer's subjective motivation is irrelevant." *Id.*

In the instant case, the facts known to the police created an objectively reasonable belief that "the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Schmerber*, 384 U.S. at 770 (citation omitted). Officers knew that an automobile accident occurred in which it was suspected that alcohol was involved (R. 559:61; 560:19). By the time they arrived on the scene, defendant had already been taken to the hospital (R. 560:4). Officers thus had to investigate the accident and interview witnesses to determine whether defendant was the driver and was intoxicated when the accident occurred. During that time, defendant's body metabolism was destroying the evidence of her intoxication. *See* Br. Amici at 4–5. Police knew that her body would continue to

destroy the evidence until they could secure a sample of her blood. *Id.* Given that some of the evidence had already been destroyed, and that the evidence would continue to be destroyed if officers sought a warrant, officers could reasonably believe that delay to obtain a warrant "threatened 'the destruction of evidence.'" *See Schmerber*, 384 U.S. at 770 (citation omitted).

The court of appeals nevertheless held that officers did not reasonably believe that an exigency existed. *See State v. Rodriguez*, 2004 UT App 198, ¶ 20, 93 P.3d 854. The court's conclusion incorrectly relied, however, on the officer's subjective motivations. This error is explained in point B.1 of the State's Brief of Petitioner.

The court also erred in requiring officers to consider factors such as "the difficulty and time required to obtain a proper search warrant," "the availability of a magistrate," and "the proximity of the nearest magistrate." *Rodriguez*, 2004 UT App 198 at ¶¶ 17–20. Neither this Court nor the Supreme Court has ever required officers faced with the imminent destruction of evidence to consider such questions. Courts only require a *reasonable belief* that during the time officers are seeking a warrant the evidence might be destroyed. *Schmerber*, 384 U.S. at 770–71.

Reasonable belief is "somewhat abstract." *United States v. Arvizu*, 534 U.S. 266, 274 (2002). It has, however, been described extensively in cases analyzing the required level of suspicion to justify a temporary detention to investigate criminal activity—i.e., a *Terry* stop. In that context, officers need only have a "reasonable,

articulable suspicion" that the person is engaged in criminal activity. *See State v. Markland*, 2005 UT 26, ¶ 10, 112 P.3d 507 (citations and quotations omitted). The belief "need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Arvizu*, 534 U.S. at 274 . It is, other words, the lowest standard of suspicion in criminal law, short of a hunch.

While the suspicion must be articulable, reasonable belief does not involve precise analysis or rigorous proof. It is a "commonsense, nontechnical" standard meant to apply to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (citations and quotations omitted). In other words, reasonable belief is a fluid concept, not a finely-tuned standard, that is "not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 695–96 (citations and quotations omitted).

Applying that standard to the question of exigency, officers need not be certain that the evidence will be destroyed or that a warrant cannot be timely obtained. They need only have a "reasonable, articulable suspicion" that the evidence might be destroyed. *Markland*, 2005 UT 26, ¶ 10 (citation and quotations omitted). Police need not precisely calculate the time needed to prepare a warrant or to obtain a telephonic warrant. It is enough that they articulate a reasonable

belief, based in the facts, that during the time they are seeking a warrant, the evidence might be destroyed.

Such a belief is present when officers know that they have already lost some evidence and that while they are seeking a warrant they will continue to lose evidence. That was the case here, where officers knew that they had already lost evidence while they responded to the scene, investigated the accident, interviewed witnesses, and determined that the driver was intoxicated and likely guilty of automobile homicide.[2] Officers knew that if they sought a warrant, the evidence would continue to be destroyed. Under such circumstances, they reasonably believed that the delay to obtain a warrant "threatened the destruction of evidence." *Schmerber*, 384 U.S. at 770 (quotations and citations omitted). Thus, it was

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[2] At oral argument, counsel for the State asserted that police did not have probable cause to draw defendant's blood until Officer Swenson located defendant at LDS hospital and saw that she was obviously intoxicated. Upon further review of the record, it appears that the officers investigating the accident had probable cause once they interviewed defendant's boyfriend at the scene of the accident and learned that the driver had been drinking before the accident at a nearby bar (R. 560:8). The timing of the probable cause determination does not change the outcome in this case, however, because officers still had a reasonable belief that the delay to obtain a warrant threatened the destruction of evidence. *Cf. Cardwell v. Lewis*, 417 U.S. 583, 595–96 (holding that automobile exception to warrant requirement is not inapplicable merely because police had probable cause and could have sought a warrant well before automobile was discovered and seized).

reasonable to obtain a sample of defendant's blood without delay to obtain a warrant.

B. The State's interest in obtaining a sample of defendant's blood outweighs her privacy interest.

Even where police reasonably believe that the delay to obtain a warrant threatens the destruction of evidence, the Supreme Court has held the search unreasonable where the suspect's Fourth Amendment interest outweighed the State's interest in obtaining the evidence. *See Winston*, 470 U.S. at 763; *Welsh*, 466 U.S. at 753–54. For example, in *Welsh*, officers had probable cause to believe that Welsh was guilty of driving while intoxicated. *See Welsh*, 466 U.S. at 753. They located him at home and arrested him in his bedroom without a warrant. *Id.* The Supreme Court held that the home intrusion was unreasonable. *Id.* at 754. It reasoned that while officers were faced with an emergency circumstance—the dissipation of Welsh's blood-alcohol level—the State did not have a strong enough interest in the evidence to justify an intrusion into Welsh's home. *Id.* The Court explained that in Wisconsin, a first offense for driving under the influence was a nonjailable civil forfeiture offense. *Id.* It held that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in [*Welsh*], has been committed." *Id.* at 753.

Thus, under *Welsh*, "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Id.* at 753. In fact, the penalty that attaches to an offense is "the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." *Id.* at 754 n.14; *see also McArthur*, 531 U.S. at 336.

The Supreme Court has also looked at the importance of the evidence to the State in proving its case. *See Winston*, 470 U.S. at 765. While it is difficult to make "determinations in advance as to the strength of the case," evidence that appears at the time of the search to be of minimal probative value may not justify an intrusion. *Id.* For example, in *Winston*, the Commonwealth of Virginia sought a warrant to compel Winston to undergo surgery to remove a bullet that was fired into his shoulder by the robbery victim. *Id.* at 755–56. The Court held that the intrusion into Winston's privacy was "severe" as it involved an almost "total divestment of [Winston]'s ordinary control over surgical probing beneath his skin." *Id.* at 765–66. The court then considered the Commonwealth's interest in the evidence. *Id.* at 765 It determined that the Commonwealth had "substantial additional evidence" that Winston had tried to rob the victim. *Id.* at 766 It concluded therefore that the surgery would be unreasonable under the Fourth Amendment. *Id.* The Court explained that the operation would "intrude substantially on [Winston]'s protected

interests" and that the Commonwealth had "failed to demonstrate a compelling need for it." *Id.* at 766.

On the opposite side of the scale, the Court looks at the nature of the intrusion to determine the weight of the suspect's Fourth Amendment interests. A suspect's Fourth Amendment interests, and hence his Fourth Amendment protections, vary based on the nature of the intrusion and the expectation of privacy. *See Terry v. Ohio*, 392 U.S. 1, 9 (1967) ("Of course, the specific content and incidents of [a Fourth Amendment] right must be shaped by the context in which it is asserted."). While a suspect's privacy interest in his home is great, *see Welsh*, 466 U.S. at 750, his privacy interest in his automobile is less. *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). Similarly, a surgical procedure may be unreasonable even with a warrant, *see Winston*, 470 U.S. at 766, while a blood draw is recognized as a minimal intrusion, *see Schmerber*, 384 U.S. at 771.

In the instant case, the State's interest in obtaining the evidence outweighs defendant's privacy interests. Automobile homicide is a second or third degree felony, depending on the level of negligence, punishable by up to fifteen years in prison. *See* Utah Code Ann. § 76-5-207 (1999). As explained in point B.3 of the State's Brief of Petitioner, the State has a substantial interest in the safety of its highways and in prosecuting alcohol related traffic offenses.

Additionally, defendant's blood-alcohol level was a critical piece of the State's case. Automobile homicide requires the State to prove that defendant has "a blood alcohol content of .08% or greater by weight." Utah Code Ann. § 76-5-207(1)(a). *Id.* The percentage weight of alcohol in the blood stream can only be proven by a test such as a blood draw or a breathalyzer. Without a test, the State can only prove automobile homicide by showing that defendant was under the influence of alcohol "to a degree that renders [her] incapable of safely operating a vehicle," Utah Code Ann. § 76-5-207(1)(a), a much more difficult element to prove.[3]

On the other hand, the intrusion on defendant's privacy interest was minimal. As explained in point B.2, a blood draw is, relative to other Fourth Amendment interests, a minimal intrusion. *See Schmerber*, 384 U.S. at 771. The intrusion was particularly slight in this case, where the draw was taken from an existing IV line (R. 560:25, 58). The State did not even need to probe beneath defendant's skin.

To summarize, an exigency justified the warrantless blood draw here because officers had a reasonable basis to believe that the delay to obtain a warrant threatened the destruction of evidence. They had already lost some evidence during the time they spent investigating the accident, and they would continue to lose

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[3] The Legislature amended the automobile homicide statute in 2002, before the instant crime occurred, to track the requirements of Utah's drunk driving statute. *See* 2002 Utah Laws 355.

evidence while they sought a warrant. In addition, defendant's blood sample was a critical component of a felony homicide prosecution and was drawn without even breaking the surface of defendant's skin.

The court of appeals erred by disregarding these interests. It relied instead on the officers' subjective motivations and their failure to calculate the time required to obtain a warrant. But the basis for believing an exigency exists need only be reasonable, not probable or more likely than not. Given the substantial interest of the state in the evidence, the minimal intrusion on defendant's privacy, and the threat of destruction of the evidence, the blood draw in this case was reasonable.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to reverse the judgment of the court of appeals.

Respectfully submitted October 6, 2006.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

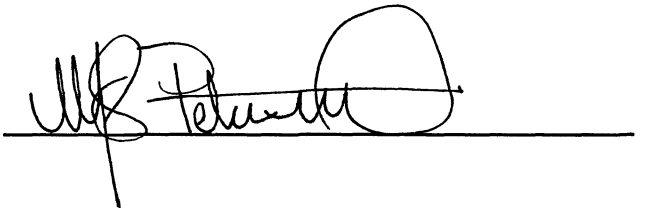
MATTHEW D. BATES
Assistant Attorney General
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2006, I served two copies of the foregoing Brief of Petitioner by first-class mail upon the following people:

Lori J. Seppi
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 310
Salt Lake City, UT 84111

Janice Frost
Counsel for Amici
220 East Morris Avenue, 2nd Floor
South Salt Lake, Utah 84115



Addenda

Addendum A

(Findings of Fact and Conclusions of Law)

DAVID E. YOCOM
District Attorney for Salt Lake County
MICHAEL E. POSTMA, Bar No. 6313
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- HEATHER RODRIGUEZ Defendant.	))))))	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 011907005 Judge Dennis M. Fuchs

Defendant's Motion to Suppress Evidence having come before this Court for hearing in the above entitled manner on October 12, 2001, in which Defendant was represented by counsel, Shannon Romero, and the State was represented by counsel, Michael E. Postma, the Court having heard evidence and having considered oral arguments of counsel, the Court now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On May 9, 2001, the defendant was driving an Isuzu Trooper southbound on State Street and approximately 1700 South in Salt Lake County. Terry Lee Stewart was a passenger in the Trooper.

2. The defendant made a left hand turn into the path of an oncoming school bus. The school bus struck the Trooper on the passenger side and critically injured the passenger, Ms. Stewart.

3. Salt Lake City Police Officers and emergency personnel responded to the scene of the collision. Emergency personnel removed the defendant from the driver's seat. Emergency personnel informed the officers on the scene that the passenger of the vehicle was in critical condition. Emergency personnel also informed the officers on the scene that the defendant smelled of alcohol.

4. Defendant Rodriguez was transported by ambulance to L.D.S. Hospital. Terry Lee Stewart was transported by ambulance to University Hospital.

5. Officer Peterson located a partially consumed bottle of Rothchild's vodka in a purse in the Trooper. The bottle of vodka was approximately three-quarters full. Terry Lee Stewart's identification was located in the purse.

6. Officer Swenson was dispatched to observe the defendant's blood being drawn. Officer Swenson first went to University Hospital where Ms. Stewart was being treated and learned she was not expected to live.

7. Officer Swenson then went to L.D S. Hospital where the defendant was being treated. Officer Swenson observed that the defendant smelled very heavily of alcohol, and when she spoke her speech was very slow and slurry. The defendant's eyes were red and bloodshot and she was uncooperative.

8. Officer Swenson was unaware how long the defendant had been in the hospital. He was also unaware of any medications that the defendant may have received or her medical evaluations.

9. Officer Swenson told the defendant that her blood was being drawn because of the traffic accident. The defendant did not respond to Officer Swenson. The defendant did not object to her blood being drawn.

10. Officer Swenson observed Brian Davis, a blood technician, draw blood from the defendant using an existing IV line, which had previously been inserted by medical personnel to treat the defendant following the collision.

CONCLUSIONS OF LAW

1. The admissibility of the blood draw is governed by Utah Code § 76-5-207(6).
2. Officers had probable cause to believe that a serious crime had been committed. *Officers were aware of the serious nature of the collision, and the fact that the* passenger of the vehicle was not expected to live. Officers also had probable cause to believe that the defendant was intoxicated at the time of the collision.
3. Exigent circumstances existed because the dissipation of alcohol in the blood is sufficient to create an exigent circumstance.
4. Information known to the officers investigating the scene of the accident was deemed to be known by Officer Swenson.
5. Because of the exigent circumstances and the probable cause that a serious offense occurred, there was no need to get a warrant, telephonic or otherwise, to draw the defendant's blood. Additionally, no arrest was necessary to draw the defendant's blood.
6. Negligently operating a vehicle while under the influence of alcohol, which results in the death of another is a felony, and is a serious offense.

7. Drawing blood from an existing IV line was non-intrusive because it was already in the defendant's body for medical purposes. The defendant's blood was drawn in a manner that does not shock the conscience.
8. The police conduct was reasonable in light of all of the circumstances.
9. The admissibility of the blood evidence is not prohibited by the Rules of Evidence or the constitution.

DATED this 4 day of ~~March~~ April, 2002.

BY THE COURT:

Honorable Dennis M. Fuchs

APPROVED AS TO FORM:

Shannon Romero

CERTIFICATE OF DELIVERY

I hereby certify that on the 28th day of March, 2002, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was delivered to:

SHANNON ROMERO
Attorney for defendant, heather Rodriguez
424 East 500 South, Suite 300
Salt Lake City, UT 84111

DAVID E. YOCOM
District Attorney for Salt Lake County
MICHAEL E. POSTMA, Bar. No. 6313
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- HEATHER RODRIGUEZ, Defendant.	ORDER DENYING DEFENDANT'S MOTION TO SUPRESS Case No. 011907005 FS Judge Dennis M. Fuchs

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, and for good cause, the Defendant's Motion to Suppress Blood Evidence is denied.

Dated this 4 day ~~of March~~ April, 2002.

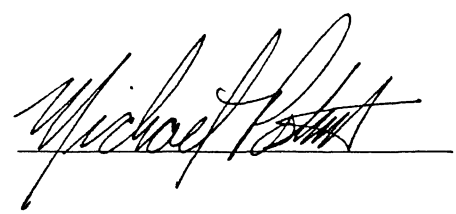
BY THE COURT:

Honorable Dennis M. Fuchs

CERTIFICATE OF DELIVERY

I hereby certify that on the 28th day of March, 2002, a true and correct copy of the foregoing ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS was delivered to:

SHANNON ROMERO
Attorney for defendant, Heather Rodriguez
424 East 500 South, Suite 300
Salt Lake City, UT 84111



Addendum B

(Utah Code Ann. § 76-5-207)

where homicide was result of automobile accident, whether defendant kept proper lookout and observed course his automobile was taking so as to avoid collision was a question for the jury. State v. Lake, 57 Utah 619, 196 P. 1015 (1921).

In involuntary manslaughter prosecution arising out of automobile accident, jury could have found that, by reason of defendant's intoxicated condition, he had failed to react in normal manner to situation which confronted him, and that his conduct was responsible cause of collision and resulting death. State v. McQuilkin, 113 Utah 268, 193 P.2d 433 (1948).

Conflicting evidence as to defendant's negligence presented jury question, unless reasonable minds could have arrived at no conclusion other than that there was no criminal negligence. State v. Read, 121 Utah 453, 243 P.2d 439 (1953).

Manslaughter.

—Negligent homicide as included offense.

Negligent homicide is an included offense under a charge of manslaughter. State v. Dyer, 671 P.2d 142 (Utah 1983).

There was no rational basis for a verdict acquitting the defendant of manslaughter and convicting him of negligent homicide, when the only issue relevant to the choice was defendant's awareness of the risk of death, and any absence of awareness could only have been due to voluntary intoxication, making unawareness immaterial under § 76-2-306. State v. Day, 815 P.2d 1345 (Utah Ct. App. 1991).

Negligence.

Mere negligence was not sufficient to authorize verdict of manslaughter. State v. Adamson, 101 Utah 534, 125 P.2d 429 (1942).

Pleas and defenses.

Acquittal under former § 57-7-102 for failure to report automobile accident was not bar to prosecution for manslaughter. State v. Cheeseman, 63 Utah 138, 223 P. 762 (1924).

Self-defense.

—Burden of proof.

The state was not required to prove the absence of self-defense as one of the elements of its cause of action. State v. Strieby, 790 P.2d 98 (Utah Ct. App. 1990).

—Evidence sufficient.

A conviction of manslaughter, after a bench trial, was contrary to the clear weight of the evidence, where defendant fatally shot her husband after his violent physical attack, coupled with his threats to kill her, led her to believe that she was in immediate danger of serious injury or death. State v. Strieby, 790 P.2d 98 (Utah Ct. App. 1990).

Cited in State v. Mincy, 838 P.2d 648 (Utah Ct. App. 1992).

COLLATERAL REFERENCES

Am. Jur. 2d. — 40 Am. Jur. 2d Homicide §§ 61, 84 et seq.

C.J.S. — 40 C.J.S. Homicide §§ 93, 94.

76-5-207. Automobile homicide.

(1) (a) Criminal homicide is automobile homicide, a third degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the vehicle in a negligent manner.

(b) For the purpose of this subsection, "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

(2) (a) Criminal homicide is automobile homicide, a second degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the motor vehicle in a criminally negligent manner.

(b) For the purpose of this subsection, "criminally negligent" means criminal negligence as defined by Subsection 76-2-103(4).

(3) The standards for chemical breath analysis as provided by Section 41-6-44.3 and the provisions for the admissibility of chemical test results as provided by Section 41-6-44.5 apply to determination and proof of blood alcohol content under this section.

(4) Percent by weight of alcohol in the blood is based upon grams of alcohol per one hundred cubic centimeters of blood.

(5) The fact that a person charged with violating this section is on or has been legally entitled to use alcohol or a drug is not a defense to any charge of violating this section.

(6) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

(7) For purposes of this section, "motor vehicle" means any self-propelled vehicle and includes any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.

History: C. 1953, 76-5-207, enacted by L. 1985 (1st S.S.), ch. 1, § 1; 1988, ch. 148, § 2; 1993, ch. 161, § 3.

Repeals and Reenactments. — Laws 1985 (1st S.S.), ch. 1, § 1 repealed former § 76-5-207, as last amended by L. 1983, ch. 99, § 20, relating to automobile homicide, and enacted present § 76-5-207.

Cross-References. — Jurisdiction of juvenile court, § 78-3a-16.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Former § 76-30-7.4, which described automobile homicide, was not unconstitutional on grounds that it substituted status of being under influence of drugs or liquor for criminal intent. State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959).

Causation.

In prosecution of driver involved in intersection collision charged with automobile homicide, jury was not required to find defendant to be sole proximate cause of death before handing down guilty verdict, and court was not required to give jury instruction on superseding intervening cause, since any negligence on part of other driver could only have been concurrent cause. State v. Hamblin, 676 P.2d 376 (Utah 1983).

Corpus delicti.

In prosecution for automobile homicide, where defendant was driving on wrong side of street when he collided head-on with car in which the decedent was riding, and woman who proved to be the deceased was observed to be bleeding and was pronounced dead on arrival at the hospital, corpus delicti was proven. State v. Romero, 12 Utah 2d 210, 364 P.2d 828 (1961).

Death of another.

Term "death of another" does not include the death of an unborn fetus, and person causing death of unborn fetus by negligent operation of an automobile does not commit automobile homicide. State v. Larsen, 578 P.2d 1280 (Utah 1978).

Double jeopardy.

Conviction of motorist for speeding or reckless driving did not bar subsequent prosecution for involuntary manslaughter. State v. Empey, 65 Utah 609, 239 P. 25, 44 A.L.R. 558 (1925); State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945).

Where defendant was charged originally with negligent homicide under former § 41-6-43.10, and after preliminary hearing the charge was dismissed and he was charged, tried, and convicted of automobile homicide, he had not been placed twice in jeopardy by having been tried for automobile homicide after dismissal of original charge. State v. Romero, 12 Utah 2d 210, 364 P.2d 828 (1961).

Evidence.

Negligibly gruesome photographs merely showing that a severe accident occurred and